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In the

Supreme Court of the United States

OCTOBER TERM, 1951

No. 656

HOUSTON & NORTH TEXAS MOTOR FREIGHT LINES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INDEX

	Page
Table of Cases Cited	ii
Table of Statutes Cited	ii
Petition for Writ of Certiorari	1
Jurisdiction	2
Opinions Below	2
Questions Presented	3
Statute Involved	4
Statement	4
Specification of Errors to Be Urged	6
Reasons Relied on for Granting the Writ	8
Argument	8
Prayer	14
Certificate	15
Appendix	17

Page

In re: Continental Southern Corporation and Oil Workers International Union, Local No. 128 (C. I. O.) 10

Table of Statutes Cited

Title 28 U. S. C. § 1254 (1) 2

National Labor Relations Act, as Amended, 29 U. S. C. A. § 151, et seq.

Section 8 ..... 3, 4, 11

Section 9 ..... 3, 6, 7, 8, 9, 11, 12, 14

Section 10 ..... 7, 12, 13, 14

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Houston & North Texas Motor Freight Line, Inc., respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on December 28, 1951 (Petition

for Rehearing denied January 24, 1952), which decreed enforcement of an order of The National Labor Relations Board, referred to herein as the Board, against petitioner.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by *28 U. S. C. § 1254 (1).*

The opinion of the Court of Appeals for the Fifth Circuit was filed December 28, 1951, and petition for rehearing was denied January 24, 1952. An order upon motion of petitioner here was made by that Court staying execution and issuance of the decree for a period of thirty days from February 19, 1952, pending the filing of this petition for certiorari.

OPINIONS BELOW

The decision of the National Labor Relations Board is reported in *88 N. L. R. B. No. 252* and *25 L. R. R. M. 1502* and is also printed in the record (R. 1-63). (The transcript of the record consists of three volumes, the first being the transcript below, the second the appendix to brief of petitioner below, the third the appendix to brief of respondent below. These will be referred to herein as R1, R2, R3.)

The opinion of the Court of Appeals is reported in ..... F (2d) ..... and is also printed in the record (R1-130).

No opinion was rendered by the Court of Appeals in denying petition for rehearing.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the National Labor Relations Board may lawfully dismiss a petition for an election filed under the provisions of Section 9 (c) (B) of the National Labor Relations Act, as amended, *29 U. S. C. A. § 159 (c) (B)*, "on the ground that further proceeding on the petition is precluded because of the pendency of unfair labor practice charges against the employer in *Case No. 16-CA-83*, alleging violation of Section 8 (a) (5) of the act."

2. Whether the National Labor Relations Board may lawfully dismiss an employer's petition for an election filed under the provisions of Section 9 (c) (1) (B) of the Act, for a reason other than that provided by law in Sections 9 (c) (1) (B) and 9 (c) (3).

3. Whether the filing of unfair labor practice charges under Sections 8 (a) (1) and 8 (a) (3) and 8 (a) (5) of the Act, against an employer constitutes a lawful ground for dismissal by the National Labor Relations Board of a petition for an election previously filed by the employer under the provisions of Section 9 (c) (1) (B) of the Act.

4. Whether, the National Labor Relations Board, having dismissed petitioners' petition for an election on the ground of subsequently filed unfair labor practice charges, and having heard such charges and issued its order thereon, and having petitioned the Court of Appeals for the Fifth Circuit for enforcement of such order, without including in the transcript of the entire record the official proceed-

ings, in the representation case, in which the petition for election was docketed, the Court of Appeals for the Fifth Circuit has jurisdiction of the petition to enforce.

STATUTE INVOLVED

Pertinent provisions of the *Labor Management Relations Act, 1947, 29 U. S. C. A. § 151 et seq.*, which is referred to herein as the Act, are set forth in the appendix.

STATEMENT

Petitioner is a motor carrier engaged in interstate commerce domiciled in Dallas, Texas, where it maintains its general office and a local office in the same building. It has terminals and local offices (where it also employs individuals performing clerical duties) outside of Dallas in Houston and Fort Worth, Texas, Oklahoma City, Oklahoma and some intermediate points. This case arose out of an attempt by Local 745, Dallas General Drivers, Warehousemen and Helpers of America, A. F. of L., to organizee the office employees at the Dallas Terminal, which resulted in a strike (July 6, 1948), an injunction by the State District Court removing the picket-line and an affirmance of such action by the Supreme Court of Texas; the filing of a petition (July 6, 1948) by petitioner here for an election to determine the authority of the Union to represent the employees and for a determination of the question of whether or not the employees involved constituted "an appropriate unit for bargaining purposes" (R2-128, 129); the filing on July 12, 1948, of charges by the

Union with the Regional Director at Fort Worth alleging unfair labor practices. (R1-9, 12.) The Regional Director and the National Labor Relations Board dismissed petitioner's petition for an election, the Board's letter, which is in petitioner's possession, being addressed to petitioner at Dallas, Texas, dated February 24, 1949, from Frank M. Kleiler, Executive Secretary of the Board, reading as follows:

> "Re: Houston & North Texas Motor Freight Lines, Inc.,
> Case No. 16-RM-8.
>
> Gentlemen:
>
> The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearing in the above matter and has sustained the decision of the Regional Director on the ground that further proceedings on the petition is precluded because of the pendency of unfair labor practice charges against the employer in Case No. 16-CA-83, alleging violation of Section 8 (a) (5) of the Act.
>
> Very truly yours,
> (s) Frank M. Kleiler,
> Executive Secretary."

The petition for election was, as stated, filed July 6, 1948, and was docketed as *Case No. 16-RM-8;* the unfair labor practice charges were filed July 12, 1948, and were docketed as *Case No. 16-CA-83.*

The National Labor Relations Board proceeded to hear the unfair labor practice case, after hearing issued its order, and petitioned the Court of Appeals for the Fifth Circuit for a decree enforcing same.

The record in the Court of Appeals did not contain a transcript of the proceedings in the representation Case, No. 16-RM-8.

In disposing of these contentions, the Court of Appeals for the Fifth Circuit held:

(1) Petitioner (respondent in that Court) cites no case, we know of none, supporting its contention that the action of the Board in dismissing the representation proceeding was unauthorized or that the failure to conduct that proceeding to a finality deprived this court of jurisdiction to hear this petition for enforcement of the Board's order entered in cause No. 16-CA-83;

(2) That action of the Board was within its discretion;

(3) When the Board dismissed the representation proceeding, it made no certification of any facts and obviously the order in the instant (unfair labor practice charge) case is in no way based upon any facts certified in any section 9 (c) proceeding;

(4) There is, therefore, nothing concerning the representation proceeding properly before this Court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

(1) On the first three questions:

(A) In holding that the action of the Board, in dismissing petitioner's petition for an election for the reason that an unfair labor practice charge was subsequent-

ly filed against petitioner was within the discretion of the Board.

(B) In failing to hold that the Board acted arbitrarily and capriciously and contrary to the plain letter of the law in dismissing petitioner's petition in case No. 16-RM-8.

(2) On the fourth question:

(A) In holding that when the Board dismissed the Representation proceeding, it made no certification of any facts and obviously the order in the instant (unfair labor practice charge) case is in no way based upon any facts certified in any section 9 (c) proceeding.

(B) In holding there is nothing concerning the representation proceeding properly before this Court.

(C) In failing to hold that it is without jurisdiction to hear and determine the issues raised by the petition for enforcement for the reason that the Board did not

> "certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which said order was entered and the findings and order of the Board."

as required by Subdivision (d) of Section 9 and Subdivision (e) of Section 10 of the Labor Management Relations Act.

(D) In failing to hold that the Board erred in holding a hearing in Case No. 16-CA-83 without having first heard and determined the issues raised in Case No. 16-RM-8.

(E) In failing to hold that the Board erred in determining and undertaking to determine in its decision in Case No. 16-CA-83 issues of representation and appropriateness of unit which should have been determined in Case No. 16-RM-8.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

ARGUMENT

A. As pointed out above, the Court below in its opinion stated "petitioner cites no case, we know of none, supporting its contention that the action of the Board in dismissing the representation proceeding was unauthorized or that the failure to conduct that proceeding to a finality deprived this Court of jurisdiction to hear this petition for enforcement of the Board's order entered in Cause No. 16-CA-83 * * *." It then holds that the action of the Board in dismissing the representation proceeding was within the Board's discretion.

The right of an employer to file a peition for an election is contained in Section 9 (c) (1) (B) of the Act. That section requires that whenever a petition shall have been filed in accordance with such regulations as the Board may prescribe the Board shall investigate such petition *and if it has reason to believe that a question of representation affecting commerce exists shall provide for an*

appropriate hearing upon due notice. That section *does not provide that the Board shall investigate such petition if an unfair labor practice charge has not been filed.* The Board is required to investigate the petition by the Act. If, after investigation, the Board has reasonable cause to believe that a question of representation affecting commerce exists, it *shall* provide an appropriate hearing upon due notice. The Act does not provide that this shall be done "unless an unfair labor practice charge is filed." After hearing, the Board, if it finds that a question of representation exists, shall direct an election by secret ballot and shall certify the results thereof. These provisions of the Act are mandatory and not discretionary. They must be so construed if they have any meaning at all. The only ground upon which the Board, under the terms of the statute, may dismiss the employer's petition for an election is that after investigation of the petition it has no reasonable cause to believe that a question of representation affecting commerce exists. Such is not true in the representation case here, otherwise the Board could not have entertained and determined the unfair labor practice charge case. To permit the Board to arbitrarily and capriciously dismiss the representation case upon the grounds assigned is to ignore the provisions of the statute.

Further, in a representation case under Section 9 (b) of the Act, "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be

the employer unit, craft unit, plant unit, or subdivision thereof." Upon dismissal of the representation proceeding the Board refused to determine the appropriate unit. Yet it undertook to determine this issue in the unfair labor practice charge case.

Petitioner's claim to its right to file the representation petition and have it processed is not without Board support. In *In re: Continental Southern Corporation and Oil Workers International Union, Local No. 128 (C. I. O.), 83 N. L. R. B. No. 100, 24 L. R. R. M. 1127*, the Board held:

> "On December 1, 1947, the Employer and the Union entered into a collective bargaining agreement which expired on December 1, 1948. After the expiration of the 1947 agreement, the parties continued their collective bargaining relations. On February 8, 1949, at the Employer request, the Union addressed a letter to proposing modifications of the 1947 contract. On February 15, 1949, the Employer replied, stating that it refused to bargain further with the Union upon the ground that it believed that the Union no longer represented a majority of its employees. On March 1, 1949, the Employer filed its petition with the Board. At the hearing, the Union moved to dismiss the Employer's petition, apparently contending that no question of representation exists in this case for the reasons: (1) that the Employer does not in good faith question the Union's majority unit; and (2) that in the absence of service of notices pursuant to Section 8 (d) of the Act, the 1947 contract is a bar to the Employer's petition.
>
> "The Union contends that the transactions between itself and the Employer since the expiration of the 1947 contract demonstrate that the Employer does not in good faith question the Union's majority among its employees, and that therefore no question of repre-

sentation exists. This contention is without merit. The Board has held that a question of representation exists under an employer petition, where the employer has been requested and has refused to recognize a labor organization as the bargaining representative for its employees notwithstanding the fact that the Employer may have previously recognized such labor organization and been party to a collective bargaining agreement with it. In this case, the question of representation which was raised by the Union's claim for recognition was put in issue when the Employer had a clear right to file a petition under Section 9 (c) (1) (B). It is immaterial whether or not there may have been any reasonable basis in fact upon which the Employer might question the Union's claim to majority representation."

There is nothing in the Act which makes the rights afforded petitioner under Section 9 of the Act subordinate to the rights of the Union under Section 8 of the Act. The 1947 amendments of the Act set up specific and separate proceedings for handling unfair labor practice cases and for handling representation cases and there can be no question that they are separate and distinct proceedings. The right of representation of a given group of employees exists only when and after "the unit appropriate for the purposes of collective bargaining" has been administratively determined. It is clearly a condition precedent to the right of representation. Undoubtedly Congress had a definite purpose in mind when it enacted the provisions of Section 9, providing the procedure for employers to follow (as well as employees) for the determination of the issues of representation and appropriate unit. Petitioner here followed that procedure strictly and its rights were com-

pletely ignored by the arbitrary and capricious action of the Board heretofore described. Under Section 9 (c) of the Wagner Act* it was specifically provided that representation cases might be heard "in conjunction with a proceeding under Section 10 or otherwise." No such provision exists in the present law. Further, Section 9(c) of the Wagner Act provided that the Board. "* * * *may* take a secret ballot of employees, *or utilize any other suitable method to ascertain such representatives.*" There is no such provision in the present law. The provisions of the present law are mandatory upon the Board, else they have no real meaning, and else they do not provide for the employer the rights Congress obviously intended to provide. The approval by the Court below of the action of the Board in dismissing petitioner's petition for the reasons stated by the Board results in the construction that Congress intended that if and when a petition for an election was filed by an employer, the Union could block the election and defeat the employer's rights simply by filing unfair labor practice charges with the Board. *The Union is thus given the power to control the election procedure.*

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*Section 9(c) of the National Labor Relations Act prior to its amendment in 1947 reads as follows: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

Section 9 (d) of the Act requires the Board "whenever an order of the Board, made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of Section 9 and there is a petition for the enforcement or review of such order, such certitification and the record of such investigation shall be included in the transcript of the entire record required to be filed under Section 10 (e) or 10 (f) * * *." Under Section 10 (e) the Court of Appeals does not have jurisdiction of the cause until the entire record as provided by the Act shall have been filed and notice thereof served upon the proper parties. The record filed by the Board in this cause does not contain the record made of the investigation of the representation petition. Certainly that investigation must have disclosed that a question of representation affecting commerce existed or not. If such a question existed, the provisions of the law as to election and determination of appropriate unit should have been followed. If such a question did not exist, then it did not exist as to the unfair labor practice charge and that case should have been dismissed. So that action in the latter case certainly was based at least on facts gained in the investigation of the representation case. As the Court knows, there is no appeal from the Board's action on the representation case, and the only way that action can be reviewed is in connection with the

unfair labor practice case. The burden is upon the Board according to the very terms of the statute to file the "entire record" with the Court. The facts as to the filing of the petition for election and the attendant determination of appropriate unit are of record; the petition itself was introduced as an exhibit (R2-128, 129). Mr. Dixon of the respondent testified he may have known the filing of the unfair labor practice charge would result in dismissal of the petition for an election (R3-79, 80) and one of petitioner's exceptions, No. 53, to the intermediate report and order ran to the arbitrary dismissal by the Board of petitioner's petition for an election (R1-60). Certainly this issue is before this Court and was before the Court below, even though no record concerning the representation case was brought to the Court below by the Board. The "entire record" required to be filed in the Court below by Section 10 (e) of the Act is a jurisdictional requirement and without such a transcript filed in the Court below its jurisdiction is not properly invoked. The Board arbitrarily failed to include the record in that proceeding in the transcript, and in view of the clear intendment of Section 9 (d) its petition for enforcement should have been denied because of the failure to file the "entire record" and lack of jurisdiction of the Court without such a record.

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory

power of this Court, and that for the reasons set out this petition for writ of certiorari should be granted.

Respectfully submitted,

HOUSTON & NORTH TEXAS MOTOR FREIGHT LINES, INC.,
Petitioner.
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By Carl L. Phinney
CARL L. PHINNEY,
Counsel for Petitioner.

CERTIFICATE

Carl L. Phinney, one of the counsel preparing the foregoing Petition and Brief hereby certifies that same is made in good faith and that in his opinion there are good grounds for same, and that such Petition and Brief are not interposed for delay.

Carl L. Phinney
CARL L. PHINNEY.

APPENDIX

PERTINENT PORTIONS OF LABOR MANAGEMENT RELATIONS ACT, 1947

(Codified as 29 U. S. C. A. § 151, et seq.)

[Public Law 101—80th Congress]

[Chapter 120—1st Session]

[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibility of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,*

That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease

using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposel or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract of a contract containing the proposed modifications;

"(3) notifies the Feneral Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employer shall terminate if and when he is reemployed by such employer.

"REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such

unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bar gaining representative has been given opportunity to be present at such adjustment.

"(b) *The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the empoyer unit, craft unit, plant unit, or subdivision thereof: Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement

shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside the whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceed $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organizations;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to

file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any

State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far is practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district

courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before

a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order

of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the courts shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written

petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

"(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor

practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for

appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purpose of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to sections 8 (b) (4) (D).

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented	2
Statement	3
Argument	5
Conclusion	8

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	5, 7
Continental Southern Corp., 83 N. L. R. B. 668	7, 5
Fitzgerald v. *Douds*, 167 F. 2d 714	5
Franks Bros. Co. v. *National Labor Relations Board*, 321 U. S. 702	7
Herzog v. *Parsons*, 181 F. 2d 781, certiorari denied, 340 U. S. 810	7
Kansas City Power & Light Co. v. *National Labor Relations Board*, 111 F. 2d 340	7
National Labor Relations Board v. *Auburn Foundry, Inc.*, 119 F. 2d 331	7, 6
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453	5, 6
National Labor Relations Board v. *A. J. Tower Co.*, 329 U. S. 324	6
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206	6
Poole Foundry & Mach. Co. v. *National Labor Relations Board*, certiorari denied, No. 563	7
Southern Steamship Co. v. *National Labor Relations Board*, 316 U. S. 31	6
Warehousemen's Union v. *National Labor Relations Board*, 121 F. 2d 84, certiorari denied, 314 U. S. 674	7

996825—52

Statutes:

	Page
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Sec. 151, *et seq.*):	
Section 8 (a) (1)	3
Section 8 (a) (3)	3
Section 8 (a) (5)	3
Section 9 (c) (1)	3
Section 9 (c) (1) (B)	3
Section 9 (d)	5

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 656

HOUSTON AND NORTH TEXAS MOTOR FREIGHT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 1. 129–134)[1] is reported at 193 F. 2d 394. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R 1. 63–120) are reported at 88 N. L. R. B. 1462.

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[1] As in the Petition, the symbol "R 1" refers to the printed transcript of record in the court below, the symbol "R 2" to the appendix to the brief of petitioner in the court below, and "R 3" to the appendix to brief of respondent below.

JURISDICTION

The judgment of the court below was entered on December 28, 1951 (R 1. 135). A petition for rehearing was denied on January 24, 1952 (R 1. 150). The petition for a writ of certiorari was filed on March 15, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151 *et seq.*), appear in the Appendix to the Petition, pp. 17–35.

QUESTIONS PRESENTED

1. Section 9 (d) of the Act requires that when a Board order in an unfair labor practice case is based upon facts certified in a representation proceeding, the record in the latter proceeding shall be included when the record in the unfair labor practice proceeding is filed in the court of appeals. The only question squarely presented (Question No. 4 in the Petition, pp. 3–4) is whether, when the Board has dismissed a representation proceeding and has not based its order remedying unfair labor practices upon any facts certified therein, the record in that proceeding must nevertheless be filed together with the record in the unfair labor practice proceeding.

2. The remaining questions stated in the Petition (p. 3) are all directed to the question whether the Board properly dismissed the representation proceeding. For reasons stated *infra*, pp. 6–7, we believe that this question is not presented in this proceeding.

STATEMENT

Following the usual proceedings under the Act the Board found that in June and July 1948 petitioner, in countering an organizational campaign conducted by the Union,[2] violated Section 8 (a) (1) of the Act by numerous acts of interference, restraint, and coercion; violated Section 8 (a) (5) by refusing to bargain with the Union after it attained the status of majority representative; and violated Section 8 (a) (3) by discriminatorily discharging or refusing to reinstate six employees (R 1. 65–70, 83–114). The court below held that except in the case of one of the alleged discriminatees (as to whom the Board does not seek review), the Board's findings, conclusion, and order were valid (R 1. 129–134). The petition for certiorari in no way challenges the Board's findings and conclusions, but is concerned solely with the Board's dismissal of a petition for an election filed by petitioner under Section 9 (c) (1) (B) of the Act.

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[2] Dallas General Drivers Warehousemen and Helpers, Local 745, International Brotherhood of Teamsters, A. F. L.

The petition in question was filed with the Regional Director of the Board on July 6, 1948, after the commission of most of the unfair labor practices summarized above (R 2. 128–129). In effect the petition alleged that a question had arisen as to whether the Union represented petitioner's office employees, and that an election should be held to resolve the question (*ibid.*, see also Section 9 (c) (1) of the Act). Six days thereafter the Union filed unfair labor practice charges, alleging the violations subsequently found by the Board (R 1. 9–12). The Regional Director refused to issue a Notice of Hearing on the July 6 representation petition, and the Board sustained his action on the ground that further proceedings on the petition were "precluded because of the pendency of unfair labor practice charges * * *" (Pet., p. 5).

The court below held that the Board acted "well within its discretion" in dismissing the representation proceeding (R 1. 131). The court, noting further that when the Board dismissed the representation proceeding "it made no certification of any facts and obviously the order in the instant [unfair labor practice] case is in no way based upon any facts certified in any section 9 (c) proceeding," concluded that "There is, therefore, nothing concerning the representation proceeding properly before this court" (R 1. 131).

ARGUMENT

1. Section 9 (d) of the Act (Pet., p. 25) provides that whenever an order of the Board in an unfair labor practice proceeding is "based in whole or in part upon facts certified" in a representation proceeding, the record in the representation proceeding shall form part of the record reviewed by the court of appeals in the unfair labor practice proceeding. As the court below correctly observed, the Board in dismissing the representation proceeding "made no certification of any facts and obviously the order in the instant case is in no way based upon any facts certified in any section 9 (c) [representation] proceeding" (R 1. 131). It follows that the record in the representation proceeding was properly excluded from the record in the instant case. See *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406–407, 408–409.[3] Moreover, inclusion in this case of the "record" in the representation proceeding—which consisted solely of the petition (introduced in evidence in the unfair labor practice case, R 2. 128–129), its dismissal by the Regional Director, the Company's request for review, and the Board's affirmance of the

[3] The Taft-Hartley amendments made no material change in the original Act in this respect. See *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717, esp. n. 3 (C. A. 2).

Director—would plainly not have altered the result in the unfair labor practice proceeding.

2. Even assuming that the Board erred in dismissing the representation proceeding, and that its action is subject to judicial review, the proceeding forms no part of the record in this case; consequently, the propriety of the Board's action in the representation proceeding cannot be placed in issue in the unfair labor practice proceeding, either in the court below or on review by this Court.

In any event, the Board's action in dismissing the representation proceeding because of the pendency of the unfair labor practice charges was manifestly correct, and *a fortiori* not an abuse of the Board's "wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees."[4] Since the pending unfair labor practice charges alleged an unlawful refusal to bargain with the Union, a decision in the unfair labor practice case sustaining that charge would necessarily have resulted in an order to bargain, regardless of the outcome of the election which petitioner sought in the representation proceed-

[4] *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, 37; see also *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458; *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U. S. 324, 330.

ing. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 704–705, and other cases cited at pp. 7–8, Brief in Opposition, *Poole Foundry and Machine Co.* v. *National Labor Relations Board,* certiorari denied, No. 563, this Term. Since the holding of the election would have been a useless act, the Board properly followed its customary, and judicially approved, course of declining to proceed further with the representation case because of the pendency of the unfair labor practice case. *Kansas City P. & L. Co.* v. *National Labor Relations Board,* 111 F. 2d 340, 358 (C. A. 8); *Warehousemen's Union* v. *National Labor Relations Board,* 121 F. 2d 84, 94 (C. A. D. C.), certiorari denied, 314 U. S. 674; *National Labor Relations Board* v. *Auburn Foundry, Inc.,* 119 F. 2d 331, 334 (C. A. 7).[5] Contrary to petitioner's contention, nothing in the 1947 amendments imposed a mandatory duty upon the Board to proceed in the representation case when to do so would only result in an election which the Board itself would thereafter properly set aside. Cf. *Herzog* v. *Parsons,* 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810.

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[5] *Continental Southern Corp.*, 83 N. L. R. B. 668, relied on by petitioner (Pet. 10–11) is manifestly inapposite; no unfair labor practice charges were filed in that case.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL, 1952.

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